

# SYSTEM LETDOWN

## WORKER SAFETY, HARM AND COMPENSATION IN THE AGE OF COVID-19



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**IN THE AGE OF COVID-19**

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# SYSTEM LETDOWN

## WORKER SAFETY, HARM AND COMPENSATION IN THE AGE OF COVID-19

### HIGHLIGHTS AND EXECUTIVE SUMMARY

No government agency has tracked worker deaths and infections caused by COVID transmission on the job.

#### Harm

During the pandemic's first year, the United States had 50 million frontline and essential workers. However, many employers did not deem worker health and safety either essential or critical, ignoring evidence that workplaces with indoor environments, poorly ventilated spaces, crowded conditions and settings with individuals known to be infected (*e.g.*, health care) were at especially high risk of COVID-19 exposure.

Countless workplaces were rife with lax or non-existent safety practices, turning them into breeding grounds for transmission and outbreaks that sickened and killed employees who were largely low income, disproportionately people of color and had no choice but to work in person. These employers included retail stores, warehouses, health care settings including nursing homes and meatpacking factories.

Weak workplace safety protocols coupled with the emergence of more highly transmissible variants Delta and Omicron have compounded the dangers to employee health and safety.

#### Non-Existent Government Oversight

Almost every worker and employer falls under the jurisdiction of the Occupational Health and Safety Administration (OSHA), which is supposed to ensure worker safety. But from the beginning of the pandemic, OSHA abdicated its mandate.

OSHA failed to issue national COVID-specific binding safety regulations despite calls from labor unions and Congress to do so.

During the pandemic, OSHA eliminated any COVID-related record-keeping requirements for employers. It failed to fill important agency positions, allowed the number of inspectors to fall to the lowest level in 45 years as inspections dramatically declined, issued paltry fines even for the worst violators and failed to protect whistleblowers.

## **Compensation**

### **The Civil Justice System**

As soon as the pandemic began, corporate lobbyists pushed state and federal lawmakers to provide companies with legal immunity when workers were exposed to COVID on the job and became sick or died, arguing without any evidence that a “wave of lawsuits” was coming.

The proposals for liability shields, some of which were extremely broad, were harmful and unsafe, removing the best financial incentive that businesses have to protect workers and consumers.

While immunity efforts ultimately failed at the federal level, many state lawmakers enacted liability shields for negligent businesses. Many laws have expired, but a significant number are still in effect.

Statistics show that a “wave of lawsuits” based on COVID exposure never materialized. That has been true around the country, whether or not a state enacted a liability shield. The reason is that state tort law already places significant obstacles in the way of those bringing negligence suits.

When workers did try to go to court, their cases often were thrown out due to preemption by both federal law (OSHA) and state workers’ compensation laws — usually the exclusive remedy for workers harmed in the workplace.

### **Workers Compensation**

Before the pandemic, workers’ compensation systems around the country had been already rife with problems, making it difficult for workers to obtain adequate compensation, and in many cases, any benefits at all.

As workers around the U.S. became sick or died from COVID infections that occurred on the job, employers and the insurance industry began aggressive lobbying and media efforts aimed at reducing their responsibility for compensating workers.

The pandemic ended up as a windfall for the insurance industry. Any claims paid have been dramatically offset by a huge decrease in non-COVID claims due to shutdowns, workforce reductions and the switch to remote work.

As to those who did seek COVID-related benefits under state workers’ comp laws, their claims were often denied. In some states and in some dangerous professions, a large majority of claims have been denied.

## SYSTEM LETDOWN: WORKER SAFETY, HARM AND COMPENSATION IN THE AGE OF COVID-19

As the famous *Hamilton* lyric goes, the telling of history depends on “who lives, who dies, who tells your story.” Let’s begin with some stories.

- “Wando Evans, who worked at a Walmart store in Evergreen Park for 15 years, was found dead in his home on March 25. He had first mentioned symptoms consistent with the novel coronavirus to management at his store two weeks prior but was largely ignored....”<sup>1</sup> “After telling his supervisor about his symptoms on March 23 he was sent home from his overnight maintenance shift and was found dead in his apartment just two days later. Another employee of the same store, Phillip Thomas, 48, died due to virus complications on March 29.”<sup>2</sup> Evans was 51.
- “At about 5 a.m. on March 19, a New York City ER physician named Frank Gabrin texted a friend about his concerns over the lack of medical supplies at hospitals.” There was “limited availability of personal protective equipment (PPE) — the masks and gloves that help keep health care workers from getting sick and spreading the virus to others,” so he wore the same mask for several shifts. “‘Don’t have any PPE that has not been used,’ he wrote. ‘No N95 masks — my own goggles — my own face shield.’” On March 31, after suffering symptoms, Gabrin woke his husband Arnold Vargas and said, “‘Baby, I can’t breathe, help me.’ He was gasping for air in great, hoarse breaths, but could not get enough oxygen. Vargas called [a friend] and 911. But by the time paramedics arrived, Gabrin was on the edge of death, or had already gone. His face had turned purple. Frank ‘passed away in my arms,’ Vargas said. ‘He was looking into my eyes.’” Gabrin was “the first ER doctor in the U.S. known to have died as a result of the COVID-19 pandemic.”<sup>3</sup>
- Enock Benjamin, a meat factory worker and union chief steward at JBS’ Souderton, Pennsylvania slaughterhouse, “first began experiencing symptoms March 27, after several coworkers began showing symptoms”<sup>4</sup> and “had checked with a doctor but was not tested for COVID-19. He thought he had a bad case of asthma, and was using a nebulizer as he coughed and lost his appetite.... By the time the family realized how sick he was, they couldn’t transport him to the hospital and called paramedics. He died soon afterward at home, in his bed”<sup>5</sup> on April 3, 2020, “just four days after the JBS slaughterhouse closed its doors because workers showed symptoms....”<sup>6</sup>

- “Marsha Bantle’s family begged her to quit after a resident in the nursing home where she worked was diagnosed with COVID-19. But Bantle wouldn’t leave” and “tried to reassure relatives she would limit her exposure, but, on April 17, her temperature spiked. Bantle, who lived alone, holed up at home. She finally called her family when it was clear she needed to be hospitalized. ...After about a week, Bantle had a stroke, likely brought on by the COVID-19 infection. Within days, she died. Since April, the nursing home has had 52 positive cases and 13 COVID-19 deaths, including Bantle’s.”<sup>7</sup>
- “Saul Sanchez died in April, one of six workers with fatal COVID-19 infections at meatpacker JBS USA’s slaughterhouse in Greeley, Colorado, the site of one of the earliest and deadliest coronavirus outbreaks at a U.S. meatpacking plant. Before getting sick, the 78-year-old Sanchez only left home to work on the fabrication line, where cattle carcasses are sliced into cuts of beef, and to go to his church, with its five-person congregation, said his daughter, Betty Rangel. She said no one else got infected in the family or at Bible Missionary Church....”<sup>8</sup>
- 65-year-old kitchen worker Marie Deus was the first Brigham and Women’s Faulkner Hospital employee to die of COVID-19. In late March 2020, “Deus called out of work sick, something she rarely did. The sneezing and coughing she was experiencing were just bad allergies, she told her sister. A longtime germaphobe, Deus always kept hand sanitizer, napkins and masks in her purse long before the pandemic caused millions of Americans to do the same.”<sup>9</sup> When arriving for work at the hospital one morning, “she hardly made it past the door. She was by the checkpoint where everyone was screened for coronavirus symptoms when she collapsed. A team rushed out of the emergency room with a stretcher, and carried her in.”<sup>10</sup> She was put on a ventilator and never left the hospital. On April 22, Deus passed away from COVID.
- 74-year-old Nancy MacDonald “was the evening receptionist at Orchard View Manor, which the Rhode Island Department of Health reports has the highest number of COVID-19 cases and deaths of any long-term care or assisted living facility in the state. ...Her last shift at Orchard View was Tuesday, April 14. ‘She came home and wasn’t feeling well,’ [her daughter] Bethany recalled. ‘She had some cough medicine. The next morning she was still in bed. She didn’t get out of bed. So, she went to bed that evening and it was about 1 o’clock Thursday morning we had her transported to Rhode Island Hospital. When she was transported, they did a COVID-19 test and it came back positive.’ Bethany said her mother never left the hospital. She died on April 25 at 6 p.m. ‘The last words I heard from her were ‘I love you too.’ So then and there, I knew she loved me, my brother and my father. Those are the last words I heard from her,’ Bethany said.”<sup>11</sup>
- Randy Narvaez worked at King Soopers for 30 years before he died of Covid-19 in May 2020. “Narvaez was working overtime in the thick of the pandemic well before the company required employees and shoppers to wear masks.... [T]here had been previous coronavirus cases at the same store where he worked. Since March 2020, there have been 28 coronavirus cases and two deaths....”<sup>12</sup>

- “It was the night of April 17, and Jose Andrade-Garcia of Marshalltown was gasping for air as he tried to talk on the phone. Andrade-Garcia, 62, a cutter at the JBS pork processing plant in the city, couldn’t finish his sentences, said his daughter, Maria Andrade. Every couple of seconds, he paused to suck in air. Andrade called 911, insisting her father spend the night in the hospital. By 3 a.m., his blood pressure dropping, paramedics rushed him from Unity Point Health in Marshalltown to University of Iowa Health Care. The doctors put him on a ventilator, then on dialysis. They sedated him. His family dialed into his room through the teleconferencing software Zoom, trying to encourage him. He never moved or opened his eyes. Andrade-Garcia, who planned to retire on April 22 after 20 years at the plant, died Friday,” May 15, 2020.<sup>13</sup>
- “Jamie Kincaid came home from his job at a mobile-home factory last May with a cough. He told his wife that several coworkers had already tested positive for COVID-19, and he worried he had caught the virus from one of them. A few days later, a positive test confirmed his fears. A few days after that, he was struggling to breathe. His wife of 25 years recalled looking into his eyes in a Silverton hospital room and begging him to ‘hold on.’ That same day he was airlifted to a hospital in Portland, where he died May 22. He was 57.”<sup>14</sup>
- “As store manager of a Taco Bell in Denham Springs, Shonda Brown spent most of the coronavirus pandemic laboring nonstop as an essential worker to keep the restaurant going. It wasn’t until she was found unresponsive in the store’s bathroom and an ambulance was called that Brown, 46, was forced to stop working. ...When she arrived at Our Lady of the Lake Regional Medical Center, staff discovered her blood sugar was dangerously high and her oxygen levels low. She was placed immediately on a ventilator and died nine days later on July 15 from complications due to COVID-19 and other medical conditions.”<sup>15</sup>

It is important, and sadly essential, to tell this story through anecdotes. The data are scarce. No government agency has tracked worker deaths and infections caused by COVID transmission on the job. According to an AFL-CIO May 2021 report,<sup>16</sup>

- During the COVID-19 pandemic, “America’s workplaces have been a primary source of COVID-19 outbreaks, with thousands of workers infected and dying. However, workplace infection and outbreak information is limited because there is no national surveillance system.”
- “There remains no comprehensive national surveillance system to collect case information by industry and occupation, and employer reporting of COVID-19 cases still is mandatory only in a few states with specific standards or orders. For the first few months of the pandemic, testing was extremely limited, so identifying confirmed cases in a timely manner was additionally complicated, but that no longer is the case. In the absence of a national system, unions stepped in early in the pandemic to gather information from members about their exposures, infections and employer responses.”

- “Despite the massive toll of COVID-19 on working people and the critical role of workplace exposures, [the Bureau of Labor Statistics] currently does not have a plan for counting and reporting workplace COVID-19 fatalities.”

But here’s what we know, so far.

## WORKER DANGERS

### THE PANDEMIC: YEAR ONE+

On March 16, 2020, while much of the country was on lockdown, then President Trump issued “Coronavirus Guidelines for America,” which stated, “IF YOU WORK IN A CRITICAL INFRASTRUCTURE INDUSTRY, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule.”<sup>17</sup> Three days later, Homeland Security issued an advisory guide for state and federal officials that designated millions of employees in health care, retail, food, agriculture, manufacturing and other sectors as “essential critical infrastructure workers.”<sup>18</sup>

Indeed, the numbers of workers so designated were staggering. “Fifty million US workers (34.5 percent of all workers) are both frontline and essential workers, meaning that they cannot work from home and their work is essential to meeting basic population needs. In this case, essential workers are those employed at a business or establishment that ‘must stay open during a public health emergency.’”<sup>19</sup>

Unfortunately, many of their employers didn’t deem worker health and safety either essential or critical, ignoring evidence that workplaces with indoor environments, poorly ventilated spaces, crowded conditions and settings with individuals known to be infected (*e.g.*, health care) were at especially high risk of COVID-19 exposures.<sup>20</sup> Moreover,

Early in the pandemic, workers faced a severe shortage of respirators and other personal protective equipment (PPE) necessary to keep them protected from the airborne virus. This shortage not only resulted in a lack of protections, but led to dangerous employer practices to conserve and reuse disposable PPE, and threats and retaliation against workers bringing in their own PPE when employers were not providing any....<sup>21</sup>

As a result, countless workplaces were rife with lax or non-existent safety practices, turning them into breeding grounds for transmission and outbreaks that sickened and killed employees who were largely low income, disproportionately people of color and had no choice but to work in person.<sup>22</sup> Below are only a few examples of the multitude of industries that compromised workers’ lives.

**Retail stores.** Grocery, pharmacy, supercenter and other workers were expected to do their jobs as usual without any safety gear or new safety protocols. Take Walmart, which “initially did little to protect store employees as customers poured into stores to stock up on food and other essentials in March. The surge made it impossible for employees to maintain a safe distance, and the company at first provided no hand sanitizer or personal protective equipment.”<sup>23</sup> “‘We’re ‘essential,’ which means sacrificial,’” a Walmart associate told *Roll Call*. “‘I have no protection. All I have is a stupid blue vest.’”<sup>24</sup>

The retail giant was not alone in leaving workers to fend for themselves:

- “When the waves of panic buying started in stores [in March 2020], many retailers resisted employees’ requests to wear masks, saying customers might find them unsettling.” At Office Depot, “employees have been told that they cannot wear masks in the store. Some Walgreens workers say they were also discouraged from wearing them. Many other large retailers, including Target, have started to allow masks, but are leaving it up to employees to procure their own supplies.”<sup>25</sup>
- One day H-E-B “baggers and cashiers were allowed to wear gloves, the next day only cashiers were allowed, and now gloves aren’t allowed for anyone” in the Houston, Texas store. “Gloves have been an especially heated topic for Trader Joe’s employees, who have been forbidden from wearing them unless they have a doctor’s note. Workers with the employee rights initiative the Coalition for a Trader Joe’s Union have said the company doesn’t want staff wearing gloves because they don’t look good for customers — despite the fact that customers might prefer them in gloves right now.”<sup>26</sup>
- In an April 2020 letter, the nation’s largest grocers’ union, 1.3 million-member United Food and Commercial Workers, called attention to the fact that employers weren’t providing employees with protective masks and gloves, limiting the number of customers to ensure in-store social distancing between workers and customers, giving employees sufficient break times to wash their hands or sanitizing frequent employee touchpoints.<sup>27</sup>

**Warehouses.** Such facilities “contain scores, hundreds, or even thousands of workers, often in cramped or tight spaces, working within high traffic and contained areas consisting of many people working at high work rates (sometimes with exertion) and/or talking at elevated volumes to overcome the din of machinery.”<sup>28</sup> In addition, the “pace of work in these environments can interfere with hygiene mitigations, such as frequent hand washing, as workers cannot take repeated bathroom breaks to sanitize after every potential exposure.”

When the pandemic first broke out, working conditions didn’t change, leaving employees vulnerable to the virus. They “worked shoulder to shoulder on conveyer belts, and they gathered for security pat-downs with little concern for social distancing. Workers for several companies were told that their employers needed them to come to work to deal with unprecedented demand, even if they felt sick and were coughing.”<sup>29</sup> In interviews and emails with the *New York Times*, UPS, FedEx and XPO workers said that “supervisors had rebuffed them when they pleaded for bleach, masks, gloves and a ready supply of

hand sanitizer. In some facilities, even hand soap and paper towels are scarce, employees said.”<sup>30</sup> And when Amazon warehouse workers raised concerns that the company wasn’t doing enough to protect them from getting sick, they were fired.<sup>31</sup>

**Health care settings.** In the absence of critical safeguards, hospital workers, nursing home staff and other health care providers, who were directly in harm’s way due to the very nature of their jobs, suffered infections and deaths at alarming rates. By the end of the first year of the pandemic, more than 3,600 health workers had lost their lives.<sup>32</sup>

“In the hardest hit places early in the pandemic, nurses and nursing assistants had to reuse protective masks or fashion their own masks out of whatever material was available. ... In some hospitals, health care workers not treating COVID-19 patients were told not to wear masks because it would frighten patients.”<sup>33</sup> In others, “managers threatened to fire nurses who spoke out about the unsafe conditions. By mid-April, thousands of nurses had tested positive for COVID-19, and more than 40 had died of COVID-19 infections.”<sup>34</sup>

At nursing homes, management was horribly unresponsive to many worker concerns, “in some cases allegedly retaliating against staff members for speaking up, which would violate federal labor law — and has withheld the most basic information about coronavirus cases and deaths.”<sup>35</sup> According the Centers for Medicare and Medicaid Services, “[b]etween May 24, 2020, and March 28, 2021, at least 563,575 cases of COVID-19 among nursing home staff were confirmed, with 193,919 suspected to be infected, 1,875 deaths and 170 reinfections.”<sup>36</sup>

**Meatpacking factories.** Even though their plants had become COVID-19 hotspots, with local health officials urging or ordering them to suspend production as thousands of workers tested positive and dozens died, Tyson, Smithfield and other large meatpackers remained focused on the bottom line. In April 2020, they aggressively lobbied the Trump administration to allow them to keep operating despite rising infections, warning that the U.S. would suffer a meat shortage if their slaughterhouses didn’t stay open as they sent record amounts of pork to China. “The meat companies were saying the sky was falling, and it really wasn’t,” Tony Corbo, a senior lobbyist at Food & Water Watch, a consumer and environmental watchdog group, told the *New York Times*. “It wasn’t that there was not enough supply. It was that the supply was being sent abroad.”<sup>37</sup>

In late April 2020, the meat processors succeeded, with Trump issuing an executive order that mirrored a version drafted by their industry trade group.<sup>38</sup> As a *ProPublica* investigation found, “Within a week of the executive order, the USDA was working with companies and local health authorities to reopen shuttered plants. With workers back on the line, operations ramped up again. Pork production, for example, had fallen by more than half by the end of April, causing steep financial losses. But by early June, meatpacking plants were nearly back to capacity.”<sup>39</sup> In November, meat processing giant Tyson announced net income of \$692 million for the fourth quarter of 2020, “up from \$369 million for the same period in 2019. ...For its part, JBS reported \$581.2 million in net profits in the third quarter of 2020, beating analysts’ forecasts.”<sup>40</sup>

An October 27, 2021 U.S. House Select Subcommittee on the Coronavirus Crisis report revealed the consequences to employee safety.<sup>41</sup> According to their investigation, at least 59,000 meatpacking workers at the nation's five largest meatpacking conglomerates — Cargill, JBS, National Beef, Smithfield and Tyson — were infected with COVID-19 and at least 269 workers died of the virus between March 1, 2020 and February 1, 2021, the first year of the pandemic. The report stated that “[t]he full extent of coronavirus infections and deaths at these meatpacking companies was likely much worse than these figures suggest,”<sup>42</sup> with studies indicating a disparate impact on minority workers.

The Subcommittee also examined internal communications and concluded that the corporations “could have done more to mitigate coronavirus infections and deaths.”<sup>43</sup> According to the congressional report,

Instead of reacting swiftly to address an apparent threat to the health and safety of their workers, many meatpacking companies such as Smithfield and Tyson prioritized profits and productions, failing to ensure that meatpacking facilities had sufficient coronavirus precautions until infection rates rose so high as to require facility closures or attract public scrutiny. As many other businesses restructured or reorganized to comply with CDC guidance, many meatpacking companies continued to ask employees to work on crowded assembly lines without screening, personal protective equipment, or time for proper hygiene.

Among the investigators' findings,<sup>44</sup>

- Internal Tyson talking points “show that on March 20, 2020, Tyson had not even begun to conduct temperature checks, but nonetheless was telling its workers: ‘It is vital that you come to work as planned, despite stories about ‘shelter in place.’”
- An internal Smithfield communication “shows that on April 21, 2020, Smithfield executives were vigorously pushing back on federal and state government recommendations for coronavirus precautions at meatpacking plants. In a draft memorandum from the Centers for Disease Control and Prevention (CDC) to the South Dakota Department of Health documenting a CDC inspection of the Smithfield's Sioux Falls facility, the Chief Executive Officer of Smithfield flagged 14 CDC recommendations for the facility as ‘problematic,’ including ‘actions to physically separate employees ... and reduce employee density in non-work areas of the facility,’ and asked what flexible attendance policies ‘have to do with’ reducing the spread of the coronavirus.”
- “In flagging touchless mask distribution as a ‘problematic’ recommendation, Smithfield's CEO speculated this measure would consume three hours of time otherwise spent working each day, calculating: ‘3800 employees x 30 seconds each = 1900 minutes = 31 hours day = 3 hours/[illegible].’ Just five days earlier, Smithfield's CEO had exchanged emails with the CEO of National Beef stating: ‘Employees are afraid to come to work.’”
- “A memorandum from the CDC and Texas health authorities to Tyson reveals that as late as May 2, 2020, many employees at Tyson's Amarillo, Texas plant were working with masks ‘saturated’

from sweat or other fluids, and in lines where workers were not socially distanced and separated only by flimsy ‘plastic bags on frames’ as opposed to CDC-compliant barriers. This plant saw over 1,900 workers contract the coronavirus — 49.8 percent of the plant’s workforce — and five employees die of the coronavirus between March 1, 2020 and February 1, 2021.”

- Company executives “continued to insist that facilities were safe. In a May 14, 2020, email, an executive for Koch Foods discussed with two trade group representatives his view that ‘work is probably the safest place [the workers] go everyday.’ A trade group representative responded: ‘I firmly believe that the safest place for employees IS in the plant.’”

## DANGERS TO WORKERS PERSIST

The second year of the pandemic saw the wide availability of vaccines, which employers used as an opportunity to “further shift away from their responsibilities to institute preventive control measures that effectively reduce COVID-19 exposures and infections,”<sup>45</sup> leading to breakthrough cases that caused injury and death. Weaker workplace safety protocols coupled with the emergence of more highly transmissible variants Delta and Omicron only compounded the dangers to employee health and safety. Among those failing to protect workers:

**Amazon.** In July 2021, the company announced it was removing in-house COVID testing and returning to many pre-pandemic practices.<sup>46</sup> Amazon “dropped some coronavirus safety measures it installed at the onset of the pandemic, such as temperature screenings, social distancing enforcement and staggered shift and break times,” while “[o]ther measures intended to prevent crowding, such as limiting capacity in break rooms and calling off so-called ‘stand-up’ meetings at the start of shifts,” were discontinued.<sup>47</sup> In late October, “the company announced that vaccinated workers no longer needed to wear masks unless mandated by state or local law. ‘Vaccines are the way out of this pandemic,’” said an Amazon spokesperson.<sup>48</sup>

Such safety rollbacks had significant impacts on worker wellbeing. For example, between November 12, 2021 and January 29, 2022, reports of COVID at an Amazon warehouse in Rialto, California surged to 1,038 cases, nearly one quarter of the facility’s average annual workforce.<sup>49</sup> Over roughly the same time period, there were 832 reported COVID cases among employees in the company’s Stockton, California facility, *i.e.*, over 30 percent of the warehouse’s average annual workforce.<sup>50</sup>

**Kroeger.** Unlike during the first year of the pandemic, the nation’s largest grocery chain “no longer informs workers when a colleague tests positive, nor maintains the cleaning protocols implemented early in the crisis,” workers told *BuzzFeed News* in January 2022.<sup>51</sup> “Those safety policies ended last year, in the spring, when things kinda leveled out,” said a meat cutter and shop steward at a Kroger in Yorktown, Virginia. “In the first year of the pandemic, ‘when somebody was sick, they sent in a cleaning crew at night to clean that department. That don’t happen no more.’”

**Meat and chicken producers.** As *Reuters* reported in December 2021,<sup>52</sup> “Across the country, U.S. meat and chicken plants that reported some of the country’s largest coronavirus outbreaks last year have eased or adjusted protective measures implemented near the start of the pandemic, according to interviews with 10 plant employees, union officials and advocates for workers. ... ‘We don’t have anybody monitoring social distancing. We don’t have anybody wiping tables down. It’s really back to normal,’” said BJ Motley, president of the United Food and Commercial Workers (UFCW).

- **JBS.** The meat processor “started staggering employees’ break times at slaughterhouses last year as a way to promote physical distancing. In July 2021, the company stopped the practice at a massive beef plant in Greeley, Colorado, the UFCW Local 7 union branch that represents plant workers said. ‘Unless they do reconstruction of the plant or they slow down the line speeds, they’re still elbow-to-elbow in the plant,’ said Kim Cordova, president of UFCW Local 7. ...The Greeley plant has reported more than 400 cases of COVID-19 among workers, including 19 since Oct. 25, 2021, state data shows.”
- **Smithfield Foods.** The pork producer eliminated a team of dedicated employees who enforced social distancing and sanitized surfaces at its Sioux Falls, South Dakota slaughterhouse. Smithfield “said it shifted the monitors’ duties to other personnel starting in the second quarter of this year because COVID-19 safety protocols became ‘second nature’ and vaccines were available. As for cleaning, the company said facilities are ‘routinely sanitized for food safety reasons.’”

“A Smithfield plant in Vernon, California, operating under the name Farmer John, stopped having employees work as social distance monitors roughly three months ago,” said a UFCW steward “who slices fat from pork in the plant. He would like to see them return. ‘It’s pretty much do whatever you want as far as the social distancing,’ he said. ‘With this new variant, you just can’t be too cautious.’”

- **Wayne Farms.** The chicken processor stopped having a Decatur, Alabama plant employee “come to work 20 to 30 minutes early to enforce proper mask-wearing as other employees arrived” despite the fact that roughly half the workers didn’t correctly wear their masks over their noses and mouths. And over summer 2021, the company ceased staggering breaks for employees.

## OSHA HAS BEEN MIA

The Occupational Health and Safety Administration (OSHA) is a U.S. Department of Labor agency that was created by Congress under the Occupational Safety and Health Act of 1970 (OSH Act).<sup>53</sup> Its stated mission is “to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and assistance.”<sup>54</sup> OSHA has the authority to issue standards and rules, conduct workplace inspections and investigations, impose penalties and respond to worker complaints.

Almost every worker and employer in the United States comes under OSHA’s jurisdiction.<sup>55</sup> The agency is responsible for ensuring the safety of “130 million workers at more than 8 million worksites nationwide.”<sup>56</sup> Private-sector workers are covered by an OSHA regional office under federal OSHA or an OSHA-approved program run by their state government.<sup>57</sup> State OSHA programs must meet but can exceed the federal program’s worker protection standards.

“Federal OSHA is responsible for inspections of private employers in 28 states, including Texas and New York, and on most federal facilities. The other 22 states, including California and Michigan, conduct their own inspections of private employers and aren’t included in the federal regulator’s count.”<sup>58</sup>

From the beginning of the pandemic, OSHA abdicated its mandate to protect worker health and safety, relying on employers to self-police. As a *Wall Street Journal* investigation put it, “The Occupational Safety and Health Administration faced one of the biggest workplace-safety challenges in its 50-year history when the coronavirus struck. It didn’t meet the moment.”<sup>59</sup>

**Failure to issue national COVID-specific safety regulations.** Under the OSH Act, employers must provide workplaces “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>60</sup> However, this “general duty clause does not provide employers with specific requirements to follow or a road map for implementing appropriate COVID-19 abatement measures.”<sup>61</sup>

When workers around the country started becoming ill or died from COVID contracted on the job, it was clear that OSHA needed to do more. Yet despite calls from labor unions and Congress, the agency refused to exercise its authority under the OSH Act to promulgate legally-binding rules, known as emergency temporary standards (ETSs), that would safeguard workers from COVID-19 specifically, prevent its spread in workplaces and provide criteria for enforcement.<sup>62</sup> Instead, beginning in March 2020 and through much of 2021, the agency issued a variety of voluntary guidance for employers that had no teeth.<sup>63</sup> Per a February 2021 U.S. Department of Labor Office of Inspector General (OIG) report,<sup>64</sup>

According to OSHA, guidance is not a standard or regulation, and it creates no legal obligations. It contains recommendations, as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. As such, guidance is not enforceable and employers cannot be required to comply.

Some states filled the void, with governors or state health departments issuing comprehensive worker protection requirements.<sup>65</sup> It wasn't until June 21, 2021 that OSHA published an ETS related to workplace COVID exposures, yet it only covered health care settings.<sup>66</sup> Six months later, the agency withdrew the standard (with the exception of certain recordkeeping requirements) since it had expired under the statutory limit and was not being replaced by a permanent standard. As of publication, OSHA still hasn't issued any binding national workplace safety rules for COVID-19.

**Elimination of record-keeping requirement.** On April 10, 2020, OSHA told employers outside the health care industry, emergency response organizations and correctional institutions that they didn't have to record cases of COVID among their employees,<sup>67</sup> "effectively instructing employers that COVID-19 infections were *not* work-related, and thus not reportable to OSHA."<sup>68</sup>

"OSHA is kidding, right?" tweeted former OSHA administrator David Michaels immediately after the guidance was released.<sup>69</sup> "The government relies on such reporting in several ways, like deciding which industries and workplaces to inspect in the future," explained the *New York Times*.<sup>70</sup> "Record-keeping also allows employers to figure out where their problems are and how to address them, making it particularly important when the agency is directing most employers to investigate coronavirus outbreaks on their own." As Jordan Barab, a top OSHA appointee during the Obama Administration told the paper, "'First and foremost, they're supposed to record so they themselves have the information necessary to determine where there are problems and when to do something about them.'" It took over a month for OSHA to reverse course and reinstate the recording requirement.<sup>71</sup>

**Insufficient number of inspectors.** The Trump administration let the number of OSHA inspectors fall to the lowest level in 45 years,<sup>72</sup> causing the agency to come into the pandemic without sufficient "ground troops that enforce federal health and safety requirements in the workplace. Inspectors flag potential hazards, investigate employee complaints, and document apparent violations, which can result in citations, fines and other penalties against employers."<sup>73</sup> As the National Employment Law Project explained, "At this staffing level, it would take the agency a whopping 165 years to inspect each workplace under its jurisdiction just once."<sup>74</sup> Moreover, "[o]verburdening inspectors reduces OSHA's ability to protect workers and spot and change practices that lead to fatalities and injuries. In fact, reducing the number of OSHA inspectors puts more workers in danger of physical harm on the job."<sup>75</sup>

**Staffing problems.** As of April 2020, OSHA had "failed to fill 42 percent of its top leadership career positions, leaving the agency without requisite expertise and direction to protect workers. Key positions such as the director of enforcement, director of training, director of whistleblower protections, and regional directors have been vacant for years. Currently, these unfilled positions are partially staffed by employees who are also holding another job — doing two jobs at once."<sup>76</sup>

**Severe decline in inspections.** On April 13, 2020, OSHA announced "that there would be few inspections of workplaces aside from those in high-risk activities like health care and emergency response. Instead, it called on employers to investigate coronavirus-related issues on their own, even in hot spots such as the food supply chain."<sup>77</sup> In the first year of the pandemic, March 2020 through February 2021, only 10 percent of OSHA's federal workplace safety inspections were virus-related.<sup>78</sup> This was despite the fact

“[w]orkers flooded state and federal OSHA agencies with complaints alleging their workplaces weren’t safe.”<sup>79</sup> The consequences of such inaction were dire. According to a *Wall Street Journal* investigation, which examined OSHA records and state health data,<sup>80</sup>

- “OSHA agencies received 72% more complaints from February 2020 through January 2021 than in the year-earlier 12 months, agency data show. That came to nearly 93,000 complaints, about 57,000 of them related to the coronavirus.”
- “The Wall Street Journal identified more than 1,000 worker deaths from Covid-19 that circumstances suggest were linked to workplace transmission of the virus but that were never investigated by an OSHA agency, as of early February [2021]. Many hadn’t been reported by employers.”<sup>81</sup> The Journal claimed that its numbers were “likely to substantially understate workplace-related employee deaths from Covid-19.”
- “The Journal also found 180 worker deaths from Covid-19 that occurred four weeks or more after complaints to OSHA agencies that the agencies didn’t investigate beyond corresponding with employers.”
- “By looking at Covid-19 figures in five states and nursing-home data from CMS, the Journal identified more than 500 Covid-19 outbreaks involving some 6,000 infections at workplaces where employees had earlier complained to OSHA of unsafe conditions.”

A February 2021 U.S. Department of Labor OIG report also deemed OSHA’s lack of inspections despite increased need as extremely problematic<sup>82</sup>:

- “Given the increase in complaints, OSHA’s reduction in total inspections, and its significant reduction in onsite inspections, there is an increased risk that OSHA has not been providing the level of protection that workers need at various job sites.”
- “Between February 1, 2020, and October 26, 2020, OSHA received 15 percent more complaints and performed 50 percent fewer inspections than during a similar period in 2019.”
- “Thirty-five percent, or 3,460 complaints, were received from 2 industry sectors: healthcare (2,363) and retail trade (1,097). The healthcare industry alone, comprised of ambulatory services, hospitals, nursing homes, and residential care facilities, accounted for 24 percent of all COVID-19 related complaints.”
- OSHA suspended most onsite inspections during the pandemic, with Compliance Safety and Health Officers switching “from onsite inspections to mostly remote inspections via telephone, video conference, or email. However, in its data system, OSHA did not track if inspections were performed onsite or remotely. It is important to track remote inspections to

determine their frequency and timeliness for identifying and ensuring abatement of worksite hazards.”

- “The OIG is concerned that without onsite observations, hazards or unsafe practices may not be identified or mitigated for longer periods, placing employees’ safety at greater risk.”
- “While remote inspections might help mitigate potential transmission of COVID-19, a reduction in onsite inspections could result in more worksite accidents, injuries, deaths, or employee illnesses.”
- “The lack of onsite inspections may impact OSHA’s ability to observe employer practices, quickly mitigate any potential hazards, and issue violations sooner to control the spread of the disease to other employees.”

**Penalties too infrequent, too low.** “During the first 15 months of the pandemic, OSHA primarily relied on existing workplace safety and health standards and voluntary employer guidance for its enforcement.”<sup>83</sup> As a result, OSHA issued a trivial number of violations, giving employers no incentive to make their workplaces safer. The U.S. Department of Labor OIG found the following<sup>84</sup>:

- It took OSHA until July 13, 2020 — *i.e.*, over four months after the start of the pandemic — to issue its first COVID-19 violations and they were levied against one employer only.
- From February 1 to October 26, 2020, “OSHA issued 295 violations for 176 COVID-19 related inspections, while 1,679 violations for 756 COVID-19 related inspections were issued under State Plans.”
- “As of October 26, 2020, or approximately 9 months into the pandemic, OSHA had performed a total of 1,133 COVID-19 related inspections, 682 for fatality and 451 for COVID-19 complaints and referrals. ...According to an OSHA official, 65 percent of these inspections remained open and could have violations issued later.”
- “The largest nurses’ union, National Nurses United, reported that as of September 16, 2020, more than 1,700 healthcare workers had died due to COVID-19, yet as of October 26, 2020, OSHA’s 497 COVID-19 fatality inspections at healthcare establishments had resulted in 198 COVID-19 violations issued to 124 healthcare establishments. According to an OSHA official, 64 percent of healthcare fatality inspections remained open and could have violations issued later.”

And when fines have been levied, they’ve been paltry, undermining their punitive and deterrence functions. Between July 2020 and January 2022, OSHA had announced just over \$4 million in penalties for more than 700 COVID-19 safety violations.<sup>85</sup>

Among those facing “pocket change” fines<sup>86</sup>: the meatpacking industry. As of November 24, 2020, “Federal OSHA has fined meatpackers only about \$70,000 since the pandemic began. Nearly 50,000

meatpacking workers across hundreds of facilities have been sickened by Covid-19. But OSHA has only issued eight workplace safety violations to meatpackers — amounting to less than \$1.50 per confirmed illness.”<sup>87</sup> The Sioux Falls, South Dakota Smithfield plant was one of the facilities receiving a slap on the wrist:

- “By April 16, [2020,] 644 cases had been traced back to the plant — 44 percent of all the cases in South Dakota at the time — pushing Sioux Falls to the top of the New York Times’ list of single-source hotspots. The initial outbreak only grew as the weeks and months went on. As of September, Smithfield’s Sioux Falls plant had reported nearly 1,300 coronavirus cases among its employees, about one-third of the plant’s total workforce. Four of those workers died.”<sup>88</sup>
- On September 10, OSHA “finally cited Smithfield for failing to protect its workers at Sioux Falls. The announcement of this corrective action was, in a sense, historic: Smithfield was the first meatpacker to be fined by OSHA for a coronavirus-related violation. Yet the fine itself — a mere \$13,494 — told a different story. The amount translated to less than \$10.50 for every worker who contracted Covid-19 from the Sioux Falls plant”<sup>89</sup> or “less than \$3,400 per preventable death.”<sup>90</sup>

Similarly, in September 2020, OSHA fined JBS only \$15,615 for a COVID-19 outbreak at its Greeley, Colorado plant where over 200 workers became infected and eight died. The low amount prompted the United Food and Commercial Workers International Union to say in an online statement: “With this latest ‘so called fine,’ OSHA and the Department of Labor prove beyond a shadow of a doubt that they do not care about holding irresponsible corporations accountable for the lives lost or worker safety.”<sup>91</sup>

U.S. Senators Cory Booker (D-NJ) and Elizabeth Warren (D-MA) echoed these concerns, finding the size of the JBS and Smithfield penalties incredibly problematic. As they wrote to OSHA in a September 22, 2020 letter<sup>92</sup>:

OSHA inspected the facilities in spring 2020, but did not take any enforcement action until September, after much of the damage was already done. And now that your agency is finally taking enforcement action, you have elected to issue the smallest possible fine for these companies’ egregious behavior, sending a message to Smithfield, JBS, and all employers that companies won’t face any real accountability from OSHA for putting workers’ lives at risk from COVID-19.

**Failure to protect whistleblowers.** Under the OSH Act, employees who raise concerns regarding unsafe conditions in the workplace are protected against retaliation from their employer. They can’t pursue a civil lawsuit against their employer if they’re fired or punished for speaking up; the only option is to file a retaliation complaint with OSHA.

According to the Department of Labor, “for the 20-month period from February 2020 through September 2021, [OSHA’s whistleblower] program received 19,800 whistleblower complaints, of which 5,816 were related to COVID-19. The total number of complaints was 29 percent higher than during the

prepandemic 20-month period from June 2018 through January 2020, indicating a significant increase in whistleblower complaints during the pandemic.”<sup>93</sup>

The whistleblower program was severely underbudgeted prior to COVID-19. The pandemic “placed an even greater responsibility on an already starved program, limiting the agency’s ability to respond to workers alleging retaliation for raising safety concerns on the job or wearing their own PPE.”<sup>94</sup> As the National Employment Law Project found, in the first six months of the pandemic, workers filed 1,744 COVID-related retaliation complaints with the agency. Yet “only 348 complaints — just one in five — were docketed for investigation; and only 35 complaints — just two percent — were resolved in that period. Most of the complaints — 54 percent — were dismissed or closed without investigation.”<sup>95</sup> OSHA’s handling of COVID-related whistleblower complaints hasn’t improved over time. From the beginning of the pandemic to April 10, 2022, OSHA has received 6,650 COVID-related whistleblower complaints, docketing only one in four and dismissing or closing 54 percent of them without investigation.<sup>96</sup>

Recently, the National Labor Relations Board took an unusual step of asking a federal judge to stop Amazon from retaliating against workers who complained “about safety issues pending the outcome of a case before the board accusing the company of unlawfully firing the worker.”<sup>97</sup> Notably, that worker, Gerald Bryson, was fired in 2020 from Amazon’s Staten Island, New York warehouse, and his case was one that may have helped lead frustrated Staten Island Amazon workers to finally unionize.<sup>98</sup>

## COMPENSATION

### THE CIVIL JUSTICE SYSTEM ISN'T ALWAYS THERE

From Spring until December 2020, the U.S. Chamber of Commerce and its business allies pushed federal lawmakers to provide companies with legal immunity when workers were exposed to COVID on the job and became sick or died.<sup>99</sup> They claimed that without such immunity businesses would be overwhelmed by lawsuits and “[v]ital industries that support our economy could suffer catastrophic bankruptcies.”<sup>100</sup> Worker and consumer advocates insisted this was unfounded fear-mongering since tort law already placed significant obstacles in the way of those bringing negligence suits by requiring proof of causation, something nearly impossible to accomplish without precise contact tracing, which did not exist in this country.<sup>101</sup>

Moreover, the proposals were harmful and unsafe. “The chamber’s proposals are all about shielding companies from liability, which is a particularly dangerous thing to do during the pandemic. Our laws should incentivize protecting workers and consumers, and the fact that companies could be held accountable for negligence is absolutely crucial to protecting people and public health,” Harvard Law School Labor and Worklife Program director Terri Gerstein told *Roll Call* at the time.<sup>102</sup>

U.S. Senate Majority Leader Mitch McConnell (R-KY) championed the Chamber’s position, holding hostage much-needed federal relief packages to state and local governments by making aid contingent on liability protections for businesses from workplace COVID-related claims.<sup>103</sup> A proposal sponsored by U.S. Senator John Cornyn (R-TX) went a step further: It sought to deny workers their day in court if they suffered COVID-related illness or death because of employer negligence *and* give employers immunity from enforcement of federal or state workplace safety requirements.<sup>104</sup>

While efforts ultimately failed at the federal level, businesses succeeded in convincing many state lawmakers to enact civil liability shields for negligent businesses. As reported by *Bloomberg Law*, “Thirty states enacted Covid-19 liability shields in 2020 and 2021 that broadly immunized businesses and other entities from lawsuits blaming them for a person’s coronavirus exposure, injury, or death. The laws generally allowed cases to proceed only if those suing could show reckless conduct, gross negligence, or meet a similar standard.”<sup>105</sup> Many laws have expired, but a significant number remain in effect.

Looking back at the data now, it is clear that worker and consumer advocates were correct — an alleged flood of exposure lawsuits never materialized. In fact, it has been extremely rare for workers and their families to turn to the civil courts to hold reckless employers responsible for illnesses and death caused by COVID exposure at work. Two-plus years of data show that of the 4,886 cases filed from January 30, 2020 to April 1, 2022 “that were a direct result of the COVID-19 pandemic and are traditional employee vs. employer cases — both individual plaintiff and class actions” — *only 2.3 percent* (113 cases) have involved allegations of negligence/wrongful death.<sup>106</sup>

There have been a few lawsuits however. They include an important case brought against Missouri's super-spreader Smithfield Foods pork plant. The facility was so dangerous early on in the pandemic that workers sued to try to improve conditions. Among other problems, there was pressure on workers to not "cover their mouths while coughing or to clean their faces after sneezing, because this can cause them to miss a piece of meat as it goes by, creating a risk of disciplinary action.... [W]orkers are typically required to stand almost shoulder to shoulder, must often go hours without being able to clean or sanitize their hands, and have difficulty taking sick leave."<sup>107</sup>

Yet the court dismissed the case, finding that ensuring plant safety was OSHA's job, not the court's.<sup>108</sup> The ruling came after President Trump signed an Executive Order<sup>109</sup> at the behest of company bosses, allowing plants to stay open with no additional safety precautions ordered. This "led to worries among unions and other worker groups. The Agriculture Department has deferred to the [Centers for Disease Control and Prevention] and [Occupational Safety and Health Administration] instead of issuing its own rules. OSHA, however, has not imposed mandatory safety rules and instead only issued recommendations."<sup>110</sup> Trump's order also "did not address crucial issues like testing, leading many companies to reopen plants or keep them operating without fully assessing whether employees had contracted the virus."<sup>111</sup>

Other cases have been brought, such as the wrongful death suits filed against Tyson Foods by the survivors of Isidro Fernandez, Sedika Buljic, Reberiano Garcia and Jose Luis Ayala Jr., who worked at the company's pork processing facility in Waterloo, Iowa. Tyson has repeatedly tried to force their cases into federal court, an effort rejected by the Eighth Circuit as recently as February 2022.<sup>112</sup> According to the families' complaints,

- "Tyson's failures led to more than 1,000 other Tyson employees at a pork processing facility in Waterloo, Iowa, contracting COVID-19, caused by the coronavirus, and the death of these four workers."<sup>113</sup>
- "Tyson executives and supervisors knew that COVID-19 was spreading through the Waterloo facility by early April 2020 at the latest but failed to provide employees with 'sufficient face coverings, respirators, or other personal protective equipment' and did not enforce social distancing measures at the facility of approximately 2,800 workers."<sup>114</sup>
- "Local health officials and the sheriff visited the facility on April 10 and then lobbied Tyson to close the plant, but Tyson refused."<sup>115</sup>
- Around that same time, "the plant manager organized a cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19."<sup>116</sup>
- "Tyson was again asked to close by county officials after nearly two dozen employees were admitted to a hospital but refused and denied that there was an outbreak. Further, it

transferred workers to that facility from another facility that was shut down due to an outbreak.”<sup>117</sup>

- One Tyson executive “directed supervisors to ignore COVID-19 symptoms” and “supervisors ordered sick workers to return to work and told employees not to discuss COVID-19 at work.”<sup>118</sup>

And in California, survivors are pursuing a lawsuit against See’s Candies that challenges workers’ compensation as the exclusive remedy for “take-home” COVID exposure. (See next section.) In March 2020, Matilde Ek, an employee at the company’s Los Angeles County, California factory, contracted COVID on the job and infected her husband, who subsequently died from the virus. She and her daughters sued See’s for wrongful death, alleging the company was “aware of the highly dangerous, contagious and transmissible nature of that virus, particularly where people are working and interacting in close proximity to each other” yet had her work “without appropriate and necessary social distancing on the packing line, using restrooms and break-rooms at times inches [or] only a few feet from other workers, some of whom were coughing [and] sneezing, and became infected along with other co-workers with Covid-19.”<sup>119</sup> In December 2021, a California appeals court allowed the lawsuit to continue, rejecting See’s argument that workers compensation was the only avenue for their claims. “When a person suffers a disabling or lethal injury, the harms they suffer from that injury necessarily extend beyond the injured person to those who love and/or depend on that person,” Justice Helen Bendix wrote in the 3-0 ruling.<sup>120</sup> According to *Reuters*, “The ruling is the first by an appeals court to allow a novel ‘take-home’ COVID-19 lawsuit, which seek damages from a business over allegations of violating safety protocols and setting off a chain of infections beyond the company’s premises.”<sup>121</sup> As of publication, the case is pending.<sup>122</sup> In addition, other California courts may follow this court’s lead.<sup>123</sup>

Much more commonly, however, workers who seek compensation are prevented from suing in court due to state workers’ compensation laws.<sup>124</sup>

## WORKERS’ COMPENSATION GENERAL FAILURES

Today, nearly every state in America has a state-regulated workers’ compensation system. While the details of this system vary by state, the concept is uniform: If an employee suffers from a work-related injury, they are entitled to compensation from their employer for lost wages and medical bills. And if a worker is killed on the job or as a result of an employment-related illness or injury, their survivors are entitled to death benefits. These systems are meant to be “no-fault” and serve as the exclusive remedy for workplace injuries, illnesses and deaths. In exchange for not having to prove fault, workers and their families give up their right to sue the employer for negligence. As the RAND Corporation explains,<sup>125</sup>

In general, workers’ compensation insurance is a form of limited liability for employers. In contrast to the tort system, damages that workers might recover are limited to the actual or economic damages associated with replacing lost earnings, providing medical care, and

supporting vocational rehabilitation. Noneconomic damages, such as punitive damages and damages for pain and suffering, are not available through workers' compensation.

Unfortunately, the workers' compensation system has been rife with problems almost since its inception. Unlike its original concept, in practice it has become an adversarial system that almost universally shortchanges injured workers. As OSHA and the Department of Labor explained in 2015 and 2016 reports, respectively:

- “[W]orking people are at great risk of falling into poverty as a result of workplace injuries and the failure of state workers’ compensation systems to provide them with adequate benefits.”<sup>126</sup>
- “[E]mployers cover only a small percentage of the overall cost of workplace injuries and illnesses through the workers’ compensation system; injured workers, their families and taxpayers bear the vast majority of the lost income and medical care costs generated by these conditions.”<sup>127</sup>
- “State legislatures and courts have made it increasingly difficult for injured workers to receive the payments for lost wages and medical expenses that they deserve. As a result of this cost-shifting, workers’ compensation payments cover only a small fraction (about 21 percent) of lost wages and medical costs of work injuries and illnesses; workers, their families and their private health insurance pay for nearly 63 percent of these costs, with taxpayers shouldering the remaining 16 percent.”<sup>128</sup>
- “Moreover, only a fraction of injured workers receive any workers’ compensation benefits through state workers’ compensation programs. Several studies have found that fewer than 40 percent of eligible workers apply for any workers’ compensation benefits at all.”<sup>129</sup>
- “While this system proves inadequate for the average worker, the workers’ compensation system performs even more poorly for low-wage workers. Many face additional barriers to filing, including even greater job insecurity, lack of knowledge about their rights, or a limited command of English.”<sup>130</sup>
- “The challenges facing individuals with work illnesses are even greater than for those with injuries. Few workers with occupational illnesses receive any benefits from the workers’ compensation system.... Most cases of work-related chronic disease are never diagnosed as work-related. When a linkage is made, the diagnosis generally comes long after employment ends. Even when a proper diagnosis is made, a worker who is eligible for benefits under Medicare, Medicaid, Veterans’ Benefits or private insurers is more likely to take that route, and avoid the barriers to obtaining benefits through the workers’ compensation system.”<sup>131</sup>
- “As the costs of work injury and illness are shifted, high hazard employers have fewer incentives to eliminate workplace hazards and actually prevent injuries and illnesses from occurring. Under

these conditions, injured workers, their families and other benefit programs effectively subsidize high hazard employers.”<sup>132</sup>

A 2018 RAND report echoed many of these concerns<sup>133</sup>:

- “Many state policy changes have had the effect of making it more difficult for workers to access benefits and needed care, while the rise of alternative work arrangements has left a growing class of workers outside the workers’ compensation system altogether. Meanwhile, disability benefits are often inadequate to protect workers from the earnings losses they actually experience after injury or illness. When workers are inadequately compensated for their injuries within the workers’ compensation system, earnings losses and medical costs may be borne by workers and their families or may be borne by health insurers or public social insurance programs in the form of cost spillovers.”
- “Cost spillovers from workers’ compensation to other social insurance programs, such as Social Security Disability Insurance (SSDI) and Medicare, place additional strain on those programs and reduce incentives for worker safety. Costs of occupational injuries extend beyond social insurance programs, to workers’ families and communities.”
- “Complexity, delays, and excessive disputes within workers’ compensation systems have been widely criticized as a factor that raises system costs and that can harm injured workers by creating an adversarial relationship with employers or preventing timely receipt of needed medical care and rehabilitation services.”
- “[W]orkers are often unable to navigate current systems without attorney representation, while system complexity can also deter workers from filing claims in the first place.”
- “Worker advocates emphasized that underreporting of injuries by workers is a widespread problem, particularly for low-wage workers who may feel vulnerable to retaliation or who may attach a sense of stigma to claiming workers’ compensation....”

This was the sad situation for workers around the country on the cusp of the pandemic. Per a February 2020 Congressional Research Service Report: “Recently, concerns have been raised over what some allege are cuts to state workers’ compensation benefits or policy changes that make it harder for workers to receive benefits. These cuts and policy changes may be shifting some of the costs associated with workplace injuries, illnesses, and deaths away from the employer and to the employee or social programs, such as Social Security Disability Insurance (SSDI) and Medicare.”<sup>134</sup>

## WORKERS' COMPENSATION AND COVID-19

In Spring 2020, as workers around the U.S. became sick or died from COVID infections that occurred on the job, employers and the insurance industry began aggressive lobbying and media efforts aimed at reducing their responsibility for compensating workers.<sup>135</sup> This included fights against state efforts to provide a legal presumption to certain essential front-line workers that if they became sick with COVID it came from their job, claiming that “bypassing the usual step in which workers have to prove their accident or illness occurred while at work”<sup>136</sup> would cost employers and insurers billions of dollars.

The truth, however, was that the pandemic was a windfall for the insurance industry. As the *Wall Street Journal* reported, “Workers filed hundreds of thousands of virus-related claims in 2020, but those cases, according to state and industry data, were more than offset by a steep drop in non-Covid-19 claims as layoffs, shutdowns and remote work reduced the number of workplace accidents and injuries.”<sup>137</sup> In fact, “[i]n the first three quarters of 2020, workers’ compensation payments and liabilities were 7.6% lower than in the same period of 2019, according to the National Council on Compensation Insurance, a trade group. That decrease is partly because insurers received fewer than expected Covid-19-related claims for long hospitalizations and deaths, said Donna Glenn, the group’s chief actuary. Given the decline in payouts, some insurers are lowering the premiums they charge employers for coverage [in 2021].”<sup>138</sup> “The numbers suggest the majority of Covid-19 claims have been relatively inexpensive for insurance companies,”<sup>139</sup> added Insurance Information Institute chief actuary James Lynch.

A January 2022 report from the National Council on Compensation Insurance and several independent bureaus showed how the pandemic benefitted workers’ compensation insurers:

COVID-19 claims accounted for 11% of all workers’ comp claims reported in 2020, but were only associated with 3.5% of total workers’ comp incurred losses, according to a recent report that examined data from 45 states.

The gap between claims versus losses is present because of a large number of pandemic-related indemnity-only claims,<sup>140</sup> which were relatively uncommon in workers’ comp before the pandemic. Indemnity-only claims, which accounted for 42% of all COVID-19-related losses, are typically less costly than typically workers’ comp claims that involve lost time benefits.

Additionally, indemnity-only claims related to COVID-19 were resolved quicker than non-pandemic-related indemnity claims. Further, the average cost of a COVID-19 workers’ comp claim was lower than that for a pandemic-associated claim, the COVID-19-related data revealed. On average, a workers’ comp claim related to COVID had a cost of \$7,800.<sup>141</sup>

A RAND study released the same month also found “no evidence of disruptions to workers’ compensation markets as yet....”<sup>142</sup> According to the report,

The COVID-19 pandemic has, so far, not had dramatic impacts on the profitability of the workers’ compensation insurance market. Far from the dire predictions at the start of the public health emergency, many employees who have contracted COVID-19 have recovered relatively

quickly, without the need for long-term, costly medical care or time off from work. And although numerous laws and regulations have been enacted across many states, many of the COVID-19 claims have not ultimately met the requirements for compensability. Additionally, some observers have noted that overall claims frequency in 2020 declined in many states. A study by the Workers' Compensation Research Institute found that in the second quarter of 2020, "the volume of non-COVID-19 [workers' compensation] claims. . . [dropped] by at least 30 percent in the vast majority of the states and by as much as 50 percent in Massachusetts."<sup>143</sup>

Indeed, when employees did seek benefits, they faced an uphill battle, with carriers "denying a significant percentage of claims related to Covid-19, even in states with the so-called presumptive-eligibility rules."<sup>144</sup> For example,

- "In California, which has a broad presumption law for certain lines of work, workers filed 93,470 claims related to Covid-19 through the end of December [2020]; 26% were denied."<sup>145</sup>
- "In Florida, which received 29,400 workers' comp claims related to Covid-19 by the end of December [2020], front-line workers who are state employees were given a presumption of eligibility. Public data show state and local employees' claims were accepted at far higher rates — with 22% denied — than claims from another pool of workers in the state that consists primarily of private-sector employees, in which roughly 56% of the cases were denied. Of the claims paid in Florida through December, less than 2% cost carriers more than \$10,000."<sup>146</sup>
- In North Carolina, "A WCNC Charlotte review of North Carolina and city of Charlotte pandemic workers' comp claims revealed most who apply for benefits are getting denied, including some front-line workers.... Statewide, data through August 31, 2021, show 63% of workers (government and non-government) who filed pandemic-related claims in North Carolina were denied."<sup>147</sup>
- "In Texas, where no presumption of eligibility for Covid-19 exists, more than 32,000 claims related to Covid-19 were filed through Dec. 6, [2020]. Insurers denied 45% of those in which workers produced a positive Covid-19 test, according to the state's Department of Insurance."<sup>148</sup>

Minnesota meat processing workers' experience highlights the system's colossal failure to compensate employees who suffered COVID-related injuries from simply doing their jobs. Early in the pandemic, meat processing plants became the sites of some of the state's biggest workplace outbreaks. By September 11, 2020, employees from plants across the state had filed 930 workers' comp claims involving COVID-19.<sup>149</sup> As of August 25, 2021, the number had increased to 978.<sup>150</sup> All claims "were denied by the companies' insurers or claims administrators."<sup>151</sup> According to Minnesota Department of Labor and Industry Commissioner Roslyn Robertson, "Some employers have taken the position that at the time when the largest number of meatpacking workers were diagnosed and reported to the Department of Health, there was broad community spread of COVID.... They took the position that an individual worker could have come in contact with COVID outside the workplace."<sup>152</sup>

Such denials also demonstrate the disparate impact on essential workers who've been excluded from state presumptions that they were infected at work, requiring them to meet a high bar that their workplace was the source of exposure.<sup>153</sup> As *MinnPost* explained,<sup>154</sup>

If you think you were infected with COVID-19 in a Minnesota workplace, you were better off being a nurse than a meatpacker.

Because of an emergency law adopted at the beginning of the pandemic, certain workers had an easier path to winning claims under Minnesota's workers' compensation law than others. That law said that certain workers who became infected were presumed to have been exposed to the virus on the job. Everyone else had to prove that the exposure was at work versus in the community.

A recent report from the state Department of Labor and Industry shows how important that law turned out to be for those who qualified: health care workers, first responders, police officers and corrections staff. ...96 percent of infected workers covered by the presumption law had their claims accepted. Workers who had the burden of proving they were exposed to COVID-19 at their place of employment, however, saw their claims denied 72 percent of the time.

According to the National Conference of State Legislatures, as of January 24, 2022,

In total, 28 states and Puerto Rico have taken action to extend workers compensation coverage to include COVID-19 as a work-related illness. Eleven states have enacted legislation creating a presumption of coverage for various types of workers. Utah and Wisconsin limit the coverage to first responders and health care workers. Illinois, New Jersey and Vermont cover all essential workers while California and Wyoming cover all workers. States have also used executive branch authority to implement presumption policies for first responders and health care workers as a part of their COVID-19 emergency responses. However, many of those executive orders have expired following the end of the state of emergency in certain states.<sup>155</sup>

The state where an employee works certainly affects their ability to access workers' compensation for COVID-related harm. For example, in Colorado, which has no presumption of eligibility, "69 percent of the 2,294 workers' compensation claims by meatpackers were denied" from the start of the pandemic to September 2020.<sup>156</sup> Saul Sanchez, a worker at the JBS plant in Greeley, Colorado, was among them. He "died in April due to complications from COVID-19. JBS, however, denied his family's workers' compensation and medical claims saying that it could not be definitively proved that he had contracted the disease while working at their plant, even though that facility had at least 291 cases of workers contracting coronavirus. According to Sanchez's family, he had not traveled anywhere and his contact with people outside of work was limited to his family and a very small group at a church where he worshipped. No one in that limited circle had tested positive for COVID."<sup>157</sup>

Similarly in Massachusetts, "[i]nsurance companies have made hay of the uncertainty"<sup>158</sup> — denying 2,500 COVID-related claims from January 2020 through the end of 2021 — while employers "played a

role in doubting the very workers they tout as heroes in public, suggesting they caught COVID elsewhere and failing to file claims for them.”<sup>159</sup> More specifically, “[t]hirty-eight workers died before their employers filed workers’ comp claims for them”<sup>160</sup> and, “[i]n many of those instances, surviving family members then had to fight for payments to which they’re entitled under the program.”<sup>161</sup>

Workers’ abilities to obtain COVID-related compensation can also hinge on the insurer. Take Oregon, where recent state data show that “an employee’s chance of receiving workers’ compensation benefits for a COVID-19 claim depends heavily on the insurer their company has. Oregon employers choose their own insurers. Many employers use the state-chartered not-for-profit SAIF Corp., but others pay for private insurance or are self-insured. The state insurance fund has accepted about 87% of the 3,986 claims related to COVID-19 that it reported to the state as of Feb. 21. In contrast, private insurance companies and self-insured companies have accepted less than 60% of the 1,531 claims they’ve reported.”<sup>162</sup>

The situation is even worse for workers who repair and build ships or work on harbor construction. They are subject to a federal law, the 1927 Longshore and Harbor Workers Compensation Act, which makes it extremely difficult for sick workers to receive workers’ compensation. The AFL-CIO reports that the Department of Labor “accepted only 7 percent of the COVID-19-related claims from longshoremen and other harbor workers between April 2020 and October 2021.”<sup>163</sup>

Those whose claims are rejected not only struggle to cover medical, funeral and other costs but also face the added burden of a complicated and lengthy process if they choose to challenge the denial. Take the family of Daniel Avila Loma, 65, who died of COVID-19 in late April 2020 after working at JBS’s Greeley, Colorado plant for 30 years. “When he got sick in March, he was working in the knife-sharpening shop, where workers dropped off their knives each day as their shifts ended. COVID-19 ran rampant at the JBS plant, which ultimately had almost 300 cases and six deaths. Loma, who had five children, 16 grandchildren and a great-grandson, was on a ventilator and had several strokes before he died. His wife and one of his adult sons, both disabled, lived with him”<sup>164</sup>; he “was the provider for the household.”<sup>165</sup> In June 2020, JBS’ workers’ comp administrator denied the claim.<sup>166</sup> A hearing was scheduled for Spring 2021, a year after Loma’s death.<sup>167</sup>

Massachusetts offers another disturbing example. According to *WBUR*, in more than 200 cases in the state, “workers or their families had to find lawyers and battle claim denials for months.”<sup>168</sup> Susan Crowell was one of them. As the station reported,

For Susan Crowell, an occupational therapist, walking into patient rooms that day was part of the job. But the risks were enormous. It was March of 2020, and everyone knew the mysterious COVID-19 illness was spreading fast. One patient had a fever. Another had a bad cough.

Crowell could not locate a mask that Friday at the Needham skilled nursing facility where she worked, records recounting the events show. A supervisor told her she didn’t need one, she said. With trepidation, Crowell went in to care for her patients. ....

Crowell grew very sick with COVID. She had extreme difficulty breathing. Suddenly, this fit 56-year-old could barely climb stairs or carry groceries. One day, she remembers, she couldn't walk across a parking lot to her car. She wound up in the emergency room.

Her employer finally did file a workers' comp claim with its insurer, Travelers Insurance. But the company denied the claim. And the reason was a gut punch: "Nature of employment is such that hazard of contracting the disease is not inherent in employment".... The form went on to say that her specific job "does not make the chances of contracting the disease materially greater than the chances of contracting disease as a member of the general population."....

After an 11-month ordeal, involving back-and-forths with the insurer, doctors, the state and massive amounts of paperwork, Crowell ultimately won a \$126,000 settlement, after lawyer's fees, from Select Rehabilitation, records show. It was enough to pay her medical bills and health insurance costs and cover part of her lost wages, she said.

But she has lost a great deal more. She still suffers from long COVID symptoms, including neurological and balance issues, as well as headaches and fatigue.

"I lost my health. I lost my job," Crowell said. "I lost my benefits, lost my income. I lost my potential income. ...I think it's important that people know that their health care heroes really got the shaft."<sup>169</sup>

To date, there remains no evidence that COVID claims are straining the workers' compensation industry whatsoever. But one thing is clear: For years to come, workers who suffer from job-related long-haul COVID and families who are blocked from death benefits will pay a high price for being denied coverage.

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